

**United States Army
Intelligence and Security Command
(INSCOM)**



**ALTERNATIVE
DISPUTE RESOLUTION
(ADR)**

PROGRAM MANUAL

Command Equal Employment Opportunity Office

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INTRODUCTION

The purpose of this pamphlet is to inform you about a new initiative for early resolution for Equal Employment Opportunity (EEO) related disputes. The U.S. Army Intelligence and Security Command (INSCOM) proposes to implement an EEO Alternative Dispute Resolution (ADR) Program designed to provide employees with a less adversarial way of resolving their EEO complaints. The "EEO ADR Program," as it is called, is in addition to all your current rights and entitlements under existing EEO procedures.

ADR refers to a range of procedures intended to resolve issues faster, at less cost, and with greater satisfaction for the parties involved with the dispute than is possible through formal litigation. The techniques are flexible and adaptable to the particularities of each individual case and permit the parties to take into account the time requirements and risk of litigation in an administrative forum. Simply stated, ADR philosophically views litigation as a last choice, not a first or even second choice for resolving disputes. ADR approaches include: mediation, conciliation, interest-based negotiation/problem solving, facilitation, and partnering among other dispute resolution techniques. INSCOM has chosen "mediation" as its primary alternative dispute resolution method.

Under the EEO ADR Program, you will have the option of utilizing a skilled mediator to assist in resolving allegations of employment discrimination. Participation in the EEO ADR process is at your option and is absolutely voluntary. Any civilian employee within INSCOM who enters into the EEO pre-complaint counseling process may request resolution under the ADR

program. You do not relinquish your right to administrative or judicial relief through the EEO process merely by participating in the EEO ADR Program.

The EEO ADR Program will be incorporated within the Command because it presents both employees and managers with an excellent opportunity to resolve legitimate disputes in a reasonable and non-threatening manner. The EEO ADR Program should create an open work culture that encourages an aggrieved employee to elect an ADR approach to dispute resolution instead of litigation. Like incorporating any new idea into our existing work culture, this process involves striking a delicate balance between having our people accept a somewhat new way of thinking and sticking with the traditional litigation based dispute resolution approaches.

An agreement to participate in the ADR program does not require the parties to reach an agreement, it only implies that the parties will use good faith in trying to resolve their conflict. If the parties resolve their dispute using the EEO ADR Program, the terms of the settlement agreement will be binding on both parties. Enforcement of any agreements will be the same as the enforcement of an agreement under the traditional EEO complaint process. If mediation fails, a final counseling session will be conducted and complainant will be given instructions in Right to File Form.

INSCOM POLICY ON EEO ADR

It is INSCOM policy to encourage maximum use of ADR mediation when unassisted negotiation is not affective. The goal is to resolve the dispute at the earliest stage feasible, preferably at the informal counseling stage, by the fastest and least expensive method possible and at the lowest appropriate organizational level.

Federal Sector Equal Employment Opportunity Regulations provides that if an employee believes that they have been discriminated against on the basis of race, age, sex, religion, national original, color, or handicap they are required to consult an EEO counselor prior to filing a formal EEO complaint in an attempt to informally resolve the matter. The aggrieved employee must contact an EEO official within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

This initial contact with the EEO official is the perfect opportunity to consider the EEO ADR philosophy that reasonable individuals can work together to resolve employment related disputes. All EEO officials will have immediate access to ADR experts to answer any question you might have early in the dispute process.

Under this EEO ADR process, an aggrieved employee, upon speaking with an EEO official, may voluntary consent to have an EEO dispute handled through the ADR process. The employee may make this request orally or in writing. The EEO Office may also recommend that an EEO dispute be considered for ADR. A counseling session must conducted regardless.

The EEO Office will have program responsibility for ADR decisions made during the informal counseling stage and formal process of the EEO complaint procedure. The EEO Office will, upon request, provide a mediator to the parties. If mediation is not appropriate, the EEO Office will seek to find another acceptable ADR process for use in specific situations.

Mediation is INSCOM's preferred ADR technique for the EEO ADR Program because its real strength lies in its facilitated approach to problem solving. It is a fair and flexible process that meets the needs of our employees. Mediation has a four point strategy. First, separate the people for the problem. Second, focus on interests, not positions. Third, invent options for mutual gain. Fourth, use objective criteria when selecting options.

It has been said that half the battle is won if the other side agrees to participate in mediation. To this end, all management officials, as part of their supervisory and program expectation, will be available to participate in ADR. Any decision not to use ADR will only be made by a supervisor or other management official after its use in resolving an issue in controversy has been fully evaluated and discussed with a higher level of supervision, the EEO Office, and legal counsel.

WHEN ADR IS MOST EFFECTIVE IN RESOLVING EEO COMPLAINTS

Experts agree that ADR works best early in the process, before parties have time to build strong emotional attachments to their positions. ADR is especially affective when there is a fact-based dispute that requires creative solutions.

ADR and specifically mediation offer a valuable opportunity to resolve EEO disputes quickly and satisfactorily. It has been the experience of other Federal activities, that mediation and other ADR techniques can resolve the majority of EEO cases at a very early stage of the dispute process. There has been extraordinary success, on a test basis, when the issues are related to leave, training, awards, work duties, and discipline.

Mediation, the preferred ADR technique for EEO complaints, works best in situations where the following types of concerns are present:

1. **Relationships between the decision maker and the aggrieved individual is strained over a particular action, but the relationship must continue in the future.** The parties might wish to avoid damaging a relationship which may preclude them from closely working together in the future.
2. **Miscommunications are apparent between the parties.** A skilled mediator frequently can improve communications between the individuals.

3. **Strong emotions are present.** The parties could benefit from the presence of a well trained neutral third party who can control the flow of the information and change the personal dynamics creating a better climate for dispute resolution.
4. **The parties are flexible and willing to settle or at least reevaluate their positions without immediately resorting to formal litigation.**
5. **Confidentiality is important.** Fewer individuals are involved with a mediated settlement compared with a case in litigation.
6. **Cost saving are considered.** Since EEO ADR involves direct negotiations between the parties, if legal advisors are present their costs are generally much lower with ADR than litigation. Additionally, the employee does not have to pay for the mediator. INSCOM will pay all costs associated with retaining the mediator.
7. **Parties wish to have greater flexibility in developing settlement alternatives.** The EEO ADR Program affords far more flexibility and lack of structural constraints, allowing you to address relationships, procedural, and substantive issues beyond those available in traditional formal litigation proceedings.

8. **Parties are interested in retaining control over the outcome of the case.** As a voluntary participant, you are free to settle, not settle, or discontinue mediation services without obligation.
9. **Parties desire to retain decision making authority with the people who best know the problem.** You and your manager each preserve all decision making authority throughout the voluntary process.
10. **Time factors are a consideration.** ADR techniques are designed to be expeditious. The speed and schedule is almost entirely up to your willingness to address and reach agreement on the disputed issues. Mediations can usually be scheduled within a few days.
11. **When the parties might benefit from the mediators role of reality testing.** Mediators also act as agents of reality to the parties, placing unrealistic expectation into proper perspective.
12. **The current EEO process is not perceived as affording you the ability to adequately resolve your complaint of discrimination.** Although, the remedy you are seeking may be available through the traditional EEO complaint process, it may also be available through mediation.
13. **Value of the disputed issue is out of proportion to the potential litigation cost and disruption to you and the Command.**
14. **When the dispute involves factual issues rather than legal issues.** Fact issues generally include those situations involving qualifications, training, awards, work assignment, etc., which account for most EEO complaints.
15. **The dispute does not involve issues of a precedence.** Precedent issues are those rare “first time” cases that are so unique they may set a new policy in INSCOM.
16. **ADR offers a “no risk” option to continuing a dispute.**
17. **Fairness is an issue.** The ADR process reduces the power imbalance normally found between parties in dispute by creating a level playing field where each participant is equally situated.

COMPARING MEDIATION TO EEO COUNSELING AND INVESTIGATIONS

Mediation, especially as part of the EEO ADR Program, should be understood as an alternative process to our traditional EEO counseling and investigations. For example, if the mediation process is successful, the matter is resolved and there will be no need for an investigator to be retained for fact-finding.

Mediation will likely lead to different results much quicker than the traditional counsel and investigation procedure. The mediation process acknowledges the emotional issues in a conflict and focus on finding a workable solution to the dispute rather than focusing on the cause or finding an individual who was at fault.

Mediation is similar to EEO counseling in many ways, including:

1. Counseling and mediating involve the relationships between the parties, and are seeking an informal resolution to a particular dispute.
2. Similar skills are needed to deal with the issues and parties, such as, active listening, communications, problem solving, negotiating, and knowledge of EEO procedures.
3. Counselors, investigators, and mediators collect information about a particular EEO dispute.
4. Counselors, investigators, and mediators are all neutral third parties to the dispute.

It is perhaps even more important to appreciate how the mediation, counsel, and investigation differ from each other. Counseling, investigating, and mediating can also be distinguished in the following ways:

1. Counselors and investigators are rights driven; mediators are interest driven. Frequently, disputes can be resolved based on the parties common interests rather than the parties rights.
2. Counselors represent an advocacy process, preparing for potential litigation while mediators represent ADR, a resolution process.
3. Counselors and investigators document their efforts for a record; mediators do not prepare a written record or report.
4. Counselors and investigators evaluate a case for facts supporting or refuting allegations of discrimination while mediators gather information to resolve a dispute.
5. Resolutions are generally based on a different criterion. Counselors seek resolution according to a perceived EEO framework, while a mediator seeks resolution according to the interest of the parties. Investigators are not authorized to seek resolution.

6. The aggrieved individual and deciding official (generally the supervisor with authority over the issue) see the EEO counselor and investigator as part of the EEO process while the mediator is viewed as part of a conflict resolution process.
7. Mediator training is substantially different than EEO counselor training.
8. Mediating is more private than counseling and investigating because fewer people are involved with the process.
9. The mediation process generally leads to more creative resolutions.
10. Mediation is a voluntary step; counseling and investigation is mandatory.
11. Mediation is less costly than an investigation.
12. Counselors can offer advice to the parties; mediators do not offer advice.

ADR MIGHT NOT BE APPROPRIATE FOR EVERY CASE

The decision by the EEO Office to offer an aggrieved employee mediation after unassisted negotiations have failed will only be made after a full evaluation of the dispute. It is anticipated that it would be an exceptionally rare occurrence for management to decline ADR after a request by an employee. INSCOM will be over-inclusive, not under-inclusive with its participation in the EEO ADR Program.

However, ADR may not be in the best interest of the parties in a limited number of cases. In these situations, both you and the Command should evaluate the ADR request a bit more closely. Even in these circumstances, listed below, it is INSCOM's policy to mediate whenever practicable.

1. A definitive or authorized resolution of the matter is required for legal precedential value such as when the outcome of a particular case may change INSCOM policy or procedure.
2. The issue is one of Government policy.
3. The matter significantly affects other parties not part of the same ADR proceedings, for example, mediation of the case may impact on another employee's pending EEO case or mediation of a large scale RIF.
4. A full public record of the proceeding is important.

5. The Command requires continuing jurisdiction over the matter in dispute. If the issue is expected to continue well into the future and require continuing Command support, it might not be an appropriate time to resolve the matter.
6. Certain very sensitive issues related to EEO complaints regarding the health, safety, and security of employees.
7. The dispute is primarily over issues of disputed law, rather than fact. For example, if the dispute is over the interpretation of a statute, ADR might not be appropriate. If the dispute is over who was the best qualified individual for promotion, ADR would be appropriate, as this is a question of fact.

BEGINNING THE EEO ADR PROCESS

Since this is a program with 100% voluntary participation from our employees, we know that easy and quick access to mediation is very important to any aggrieved employee or they will not use the program. We have made the mediation procedures as simple and “user friendly” as possible. It begins with contacting an EEO counselor.

Following is a summary of steps that will take you, as an aggrieved employee, quickly into mediation.

1. The EEO ADR process begins with an aggrieved employee contacting an EEO counselor within 45 calendar days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 calendar days of the effective date of the action.
2. The EEO counselor will work with the EEO Office to afford you quick access to ADR mediation.
3. Mediation will be proposed by you, the EEO counselor, the EEO Office, or a management official. However, mediation of an EEO issue may only be accepted by you, the employee. Your control over acceptance is one of the hallmarks of the ADR process.
4. After a decision by the EEO Office that the issues are appropriate for mediation, the mediation option will be offered to you in writing. Almost every EEO issue is appropriate for mediation.
5. If you accept mediation, in writing, the EEO Office will contract a mediator within 3 workdays and the pre-complainant processing period will be extended within 90 calendar days of first contact.
6. The EEO Office will notify the mediator of the issues accepted in the dispute, identify the parties, and advise the mediator of any special needs by the parties.
7. The assigned mediator will contact you directly to arrange your mediation. The date, time, location, and specific issues for mediation will be confirmed in writing to you within 4 to 9 workdays of your request. The mediation will begin within 10 workdays of your request.
8. The assigned mediator will be a trained individual with whom you or the deciding official will have never met.
9. If you believe that the assigned mediator will not handle your case fairly, immediately contact the EEO Office to request another mediator.
10. The opportunity for mediation will be offered both at the informal stage and again in the formal stage, before an EEO Commission hearing or Final Agency Decision without a hearing. ADR works best when accessed early in the process.
11. You have the right to representation at all mediation sessions. This can be your attorney or designated representative.

PREPARING FOR MEDIATION

Once a mediator is assigned and you have a scheduled mediation date, you might wish to prepare a few notes or outline your thoughts to make the mediation as productive as possible.

Mediation is actually an assisted negotiation, so the best way to prepare for mediation is to prepare well for negotiations. It is a very informal process, geared to dispute resolution rather than compliance with a complicated set of legal or procedural requirements as is the case with adversarial (litigation) based resolutions.

Here is a checklist of items to consider before you start your mediation session.

1. **Why is there a dispute?** Be careful to assess blame for the dispute. However, thinking about “why is there still a dispute at this time” is your first step toward resolution. It is not uncommon for an employee to feel aggrieved but not be able to articulate why.
2. **List your interests that must be met for a satisfactory settlement to be reached?** Your interests should be looked at from the perspective of creative problem solving. Is money or prestige or work assignments most important.

Your “real” interests probably are fairly flexible. List them all for now, you can sort through the prioritizing later. Consider traditional and non-traditional needs.

3. **Next, try to list the interests of the other party to the dispute.** Speculate freely and list any identifiable interest that they would have to settle the case. Skip this step if you cannot think of their interests, it will come out during mediation.
4. **Think about the parable of two sisters fighting over the last orange to illustrate how two parties’ interest can differ yet not be at odds.** It seems two sisters each wanted the orange, resulting in the decision to cut the orange exactly in half. One sister ate the pulp and threw out the rind, while the other sister used the rind for baking and threw out the pulp. In litigation, by analogy, one sister gets the entire orange, the other sister gets nothing. ADR’s focus is on common interests, not fault or power or who will win in court.
5. **Before entering mediation, remember your MOMS.** MOMS is an acronym for Many Options Multiply Settlements. MOMS is your list of best possible settlement options. Do a quick “reality test” with MOMS to determine if the list is realistic. Any settlement options raised during mediation would have MOMS as a basis of comparison. The comparison will also assist you in determining when to stop negotiations and pursue another means of dispute resolution.

6. **Write down as many different settlement options as you can.** Even if a settlement option only resolves part of a dispute. This is your opportunity to be inventive and flexible. Your list of potential settlements when added to those of the other party and the mediator's list will be the framework for settlement discussions lead by the mediator. Do not dwell on the obvious, think of your interests, rather than the merits of your case.
7. **Another factor to contemplate before actual mediation is your expectation of future contacts with the other party after the negotiations.** If you will be working together, the nature of your negotiations may be different than if you will not have any significant contact in the future.
8. **Try to set strong emotions aside for the mediation. This is difficult, and it is not suggested that you should ignore your emotions.** However, it does mean thinking about how feelings of anger or frustration can be expressed constructively to the deciding official.
9. **Bring a list of any unanswered questions to the mediation session.** The mediator will cover all procedural issues at the beginning of the mediation session.

10. **Be prepared to mediate in one or several sessions.** Mediations last from a few hours to a few days, depending on the parties and issues. The success of the mediation is tied more directly to the good faith efforts and creativity of the parties than it is to the length of time it takes to mediate.
11. **At the mediation session, be yourself.** The mediator will help you through the process with as little stress as possible.

Reading this pamphlet is a good start in your preparation. If you want additional information on the mediation process, it is readily available from your INSCOM Equal Employment Opportunity Office, public/private library, or private organizations such as the American Arbitration Association or the local Bar Association.

THE EEO MEDIATION SESSION

Now that you know how to prepare for mediation, what actually happens when you get there? The EEO ADR Program belongs to all of us. Understanding the mediation process is one of the key elements of changing the organizational culture of how we deal with future EEO disputes within INSCOM.

Most of us are very familiar with the litigation process, from TV, newspapers, movies, books, or personal experience. However, only a few of us have actually attended a mediation session or received sufficient training to really appreciate just how effective the mediation process is in solving workplace disputes.

INSCOM is committed to training and informing our employees about ADR and mediation. This is one of the primary purposes of this pamphlet. You can expect to see much more information in the near future on ADR and mediation in the EEO process.

In order to gain a better awareness of the mediation process, it is useful to be familiar with the general steps, listed below, followed during a typical mediation.

1. The mediation will begin with the mediator introducing himself or herself to the parties; outlining the issues accepted for mediation; discussing procedural ground rules; explaining the use of caucuses (private meetings); and describing how possible settlement options will be developed. How the mediation terminates, with a settlement, partial settlement, or no settlement will also be addressed. The purpose of this introductory stage is to originate a

framework of reasonableness and develop the parties' trust in the mediator and their ability to work together.

2. Opening statements will be made first by the initiating party, then by the other party. Mediators will ask questions and summarize the statements for clarity before continuing the mediation. As a courtesy, opening statements by one party are not interrupted by the other party.
3. After opening statements, the mediator will prioritize the issues into a workable problem solving agenda with the parties. Easier issues will usually be dealt with first to create a positive momentum in the negotiations.
4. The mediator will facilitate discussions with the parties jointly about common interests and possible areas of resolution.
5. Mediators may want to meet with each of the parties separately to help develop settlement options, evaluate a proposal, or do a bit of reality testing with a party. This is called a "caucus" and may occur several times during a mediation session.
6. After a caucus is completed, the mediator may wish to caucus with the other party or have the parties meet jointly to discuss issues and potential settlement.

7. All caucuses are “in confidence” and held with one or more parties outside the mediation room. Absolutely no significance is attached to whether a party is inside or outside the caucus or how long a caucus has lasted.
8. Settlement options may be generated by the parties through structured discussions in joint sessions or developed through conversations with the mediator in caucuses.
9. During joint sessions, if the parties can agree to one of the settlement options developed, the mediator will prepare a detailed draft Memorandum of Understanding (MOU) which the parties will sign as the basis for a formal “Settlement Agreement.” In certain situations, the actual Settlement Agreement will be signed at the mediation.
10. The mediator will end the mediation thanking the parties and advising them of their obligation to keep the proceedings confidential. This is the last phase of mediation called “closure.”
11. If the mediation does not lead to an agreement or MOU, the mediator will advise the EEO Office. The case will then proceed under the traditional EEO procedures, without regard to mediation.
12. Remember, the mediator is neutral at all times and is there to assist you in resolving your dispute, not to represent you or the other party.

CONFIDENTIALITY OF MEDIATION IS IMPORTANT

Mediation brings with it certain expectations of privacy, between the parties, to a dispute. All information gained by the mediator “in confidence” will not be disclosed to any other party without permission. Mediation will create at least three separate sets of confidential information originating from the aggrieved party, the deciding official, and the parties jointly.

This privacy greatly enhances the parties ability to candidly discuss settlement of disputes without fear that disclosures might impact future litigation should the case not be resolved. We believe that settlements are best encouraged when the confidentiality of the mediation process is protected.

A skillful mediator can often speed negotiations and increase chances for agreement by holding separate private confidential meetings with the parties, called “caucuses.” During the caucus, each party is encouraged to give the mediator a full and candid account of their own interests, discuss what they would be willing to accept in terms of settlement, and consider alternative approaches. The mediator may also carry messages between the parties and act as an agent of reality for the parties.

All conversations and material produced during a mediation session are strictly confidential as is the mediation itself. The mediator will not disclose or discuss with anyone outside of the mediation session anything that occurred between the parties during the mediation. Resolutions arising out of a mediation will be disclosed only on a need to know basis for approval and implementation of the settlement.

Should the case proceed without resolution, INSCOM as a matter of policy will not seek to discover or otherwise force disclosure of a mediator’s notes, memoranda, recollections, or of documents provided to the mediator “in confidence” in the course of settlement negotiations. The parties will also agree in writing not to require the mediator to testify regarding statements made in the mediation session. This means that the mediator cannot become a witness for any party at a future proceeding.

You and the deciding official also agree in writing not to disclose any information learned during the mediation session. Simply stated, both the mediator and parties will not voluntarily disclose or be required to disclose any information concerning any written or oral communication provided “in confidence” to the mediator during the mediation session unless:

1. all parties to the mediation consent in writing;
2. the communication has already been made public;
3. the communication is required by statute to be made public;
4. a valid court order directs such testimony or disclosure;
5. one or both parties must disclose information relevant to determining the agreement that resulted from the mediation and/or to enable enforcement of the agreement; or

6. significant health, safety, or security issues arise that require immediate attention by the Command. This rare circumstance might occur, for example, if a party seriously threatened violence to another party during mediation or information of a security violation was unfolded.

Any evidence otherwise discoverable will continue to remain discoverable, without regard to mediation. This means that the mediation process will not make an available document unavailable merely because mediation was elected.

The gathering of statistical information, research, or educational purposes will be permitted; however, the parties in controversy will remain confidential.

Mediators are by definition a “neutral” and impartial third party who assists the parties in a conflict with negotiating an acceptable settlement of contested issues. Therefore, a mediator shall have no personal expectation of confidentiality or privacy as it relates to any material, financial, or personal conflict of interest with respect to the issue, basis in controversy, or the outcome of the mediation; unless such conflict is fully disclosed in writing to all parties involved and all parties agree that the mediator may serve.

QUESTIONS AND ANSWERS

Why does INSCOM prefer mediation to other forms of ADR?

Mediation is relationship oriented, and is designed to improve the process used by the parties to resolve a dispute. Mediation is highly flexible, voluntary, and allows the disputing parties to design and tailor their own agreements. INSCOM also prefers it to other third party decision making procedures because of its focus on party interests, not blame.

Is there a fee for using mediation?

No. The Command will pay any fees charged by the mediator.

What if the disputants want a different mediator?

If you believe that the mediator assigned to your case is unacceptable, you should immediately contact the EEO Office and request another mediator. The EEO Office will determine whether to assign another mediator to the case. Generally, a request for a different mediator will be honored.

What is the mediator's role?

The mediator's role is to help people who are involved in conflict work out a practical solution for themselves. A mediator does not weigh the law and evidence and then tell the parties who is right and wrong, like a judge. Nor does a mediator give people advice like a counselor.

Can a deciding official decline participation in the EEO ADR Program?

INSCOM has made the policy decision that managers will participate in the EEO ADR mediation effort as part of their official management functions. If any particular manager or supervisor wishes to

decline participation, another deciding official, higher in the chain of command with settlement authority will be substituted and good faith mediation will proceed accordingly.

Where will the mediation be held?

The mediator will set the time and location of the mediation, usually at or near your worksite.

Why should I consider mediation?

Traditional approaches to resolving conflicts, such as courtroom litigation, can be protracted and expensive. Additionally, adjudication and litigation often do not succeed in settling the real issues underlying a dispute. Mediation offers a prompt equitable resolution to the fundamental issues in a dispute.

Must an aggrieved employee participate in the Mediation Program?

No. The program is completely voluntary.

If I have several EEO complaints, can I mediate them together?

Each request for mediation is evaluated based on its own fact pattern. Cases may be combined or mediated separately depending on the complexity of the cases and commonality of Deciding Officials.

If mediation is unsuccessful, can I still sue the Government?

Yes. Participation in the EEO ADR Program is in addition to all existing courses of action available to each employee.

Will ADR work in my case?

Available data indicate that agreements are reached in about 80% of the cases using ADR in which the parties seeking resolution have authority to make and implement an agreement. Even when ADR does not result in an agreement, the process tends to narrow the issues before reaching the traditional forums. The byproduct is more efficient litigation, should this be pursued.

Do I need an attorney to help me mediate?

This is a difficult question to answer with a generalization. Each EEO case is different and depends on the complexity of the case, as well as, your own communication skills. The EEO ADR Program is designed to allow the employee and management official to directly resolve a dispute. However, if you are not sure, ask your personal attorney whether he or she advises legal representation during mediation.

What is the primary distinction between mediation and an EEOC hearing?

The EEOC hearing is more of a formal adversarial process, with an administrative judge holding an evidentiary hearing and rendering a recommended decision to the Command. The mediator does not have authority to make a recommended decision, but instead works with the parties to reach a mutually satisfactory conclusion to their dispute.

Who has the “burden of proof” during mediation?

No one. The burden of proof is a legal concept used for litigation. Mediation precludes the need to prove a case since the emphasis is on resolution, not blame.

Is there a stenographic record of the mediation session?

No. Mediation sessions are confidential. Any records received from a party during the mediation session will be returned or destroyed.

Are the mediation sessions private?

Yes. Only the parties and their representatives may attend the mediation session. Other persons may attend with the consent of all the parties and the mediator.

What happens if I settle my case through ADR?

The settlement agreement will be binding and will prevent any further action on the merits of the case before any administrative or judicial forum.

Will I have to take an oath to tell the truth?

No. It is understood that the parties are acting in good faith and will not mislead, misstate the facts, or generally obscure the facts at issue in the controversy.

If my supervisor is the problem, how can I mediate with him or her?

Mediators are trained for just this situation and have skills in developing a non-threatening approach to dispute resolution. If you feel very strongly about this situation, discuss it with the EEO Office. The EEO Office has some discretion in this area.

May the mediator terminate the mediation?

Yes, if it appears that resolution of the dispute is unlikely.

My EEO complaint is pending before the Merit Systems Protection Board (MSPB); may I still use ADR?

Most likely yes; however, MSPB actions are outside the scope of this pamphlet. Contact the EEO Office or Personnelist for more specific guidance in this situation.

Can we get qualified mediators?

Yes. All mediators must meet a high standard of excellence before INSCOM will accept them as part of its EEO ADR Program. We have diversity of mediators available from both inside and outside the Government. One commercial book lists over 60,000 professionals involved in dispute resolutions.

How are the results of the mediation documented?

The meeting itself will not be documented, other than whether an agreement was reached. If an agreement is reached, the agreement itself will be the documentation of the successful mediation. If an agreement is not reached, a record of the names, issues, and dates of mediation will be made. No documentation will be maintained of any information gained in confidence.

How does a manager benefit from mediation?

Managers benefit from mediation in many of the same ways as do their employees. They save money; they make more efficient use of their limited resources; and they preserve the integrity of ongoing work relationships. Managers also have the opportunity to be more creative in developing resolution possibilities than is possible under litigation.

Who selects the mediator?

The EEO Office will contract the mediator locally from a federally approved source.

What if I am fighting for a principle?

The mediation program is designed to resolve specific factual dispute among specific parties. The motive for bringing your action is only a good faith belief that you may have been the victim of illegal employment based discrimination or reprisal. If you believe that there is some systemic issue which needs to be addressed, discuss it with the EEO Office.

What is the Administrative Conference of the United States?

It is an independent agency of the Federal Government established in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures used by other Federal activities. The Administrative Conference has an ongoing program to help agencies implement the Alternate Dispute Resolution Act (Pub. L. No. 101-552). Much of their material was used to prepare this EEO ADR Program for the U.S. Army Intelligence and Security Command.

CONCLUSION

The U.S. Army Intelligence and Security Command encourages the early resolution of EEO claims through innovative methods of ADR such as mediation, and has pledged to explore the possible use of ADR in resolving other types of disputes. The procedures described in this pamphlet are intended to be very flexible and allow for the parties to resolve an EEO dispute without unnecessary bureaucratic interference. In summary, the EEO ADR Program offers you and the command many mutual advantages, including:

Speed:

Court proceedings are cumbersome, lengthy, and frequently leave the parties with an unacceptable result. The mediation process will normally take only a few weeks from request to settlement.

Protection of Relationships:

Mediation generally results in a settlement both parties can accept and support; promotes better communications between them; and encourages a respectful and cooperative relationship.

Reduced Cost:

Both you and the command will save money by avoiding the significant cost associated with litigation. If an attorney is retained, the fees are generally far smaller than the fees for litigating the same case. The command can often avoid the cost of the EEO investigator.

Experienced Neutrals:

Mediators used by INSCOM will have strong skills and expert knowledge of EEO obligations.

Fair Process:

Mediation is completely voluntary, ensuring that any settlement will be acceptable to the parties. The mediator, as a neutral party may suggest ways of resolving the dispute, but cannot impose settlement on the parties. There is far greater flexibility developing possible settlements as the parties are encouraged to develop customized creative and equitable solutions tailored to their specific interests.

Even when ADR does not lead to an acceptable agreement, the resources invested in the effort are not lost. The disputants remain free to take their conflict to a hearing or to court, and the preparations for mediation will contribute to the development of a more focused, manageable traditional case.

APPENDIX

GLOSSARY OF SELECTED EEO ADR TERMS

Alternative Dispute Resolution or ADR:

Any technique for resolving complaints of discrimination without resorting to litigation in either an administrative or judicial forum. ADR techniques include: mediation, interest-based negotiation, problem solving, partnering, facilitation, and conciliation.

Deciding Official or Management Official:

The supervisor or person with organizational responsibility for taking (or not taking) an action in which an issue in controversy has arisen. For example, in a merit promotion based claim, it would be the selecting supervisor. In a work assignment based claim, it would be the first line supervisor. Deciding officials, as a matter of INSCOM policy, are available to participate in the “**Early Neutral Evaluation**”: An unbiased third party with strong experience in evaluating EEO complaints; reviews the merits of each party’s position at an early stage of the dispute process in order to facilitate an early resolution.

Conciliation:

A conciliator may assist parties by helping to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Some of the techniques used by conciliators include: providing for a neutral meeting place, carrying initial messages between/among the parties, reality testing regarding perceptions or misperceptions, and affirming the parties’ abilities to work together. The conciliation method is often used in conjunction with methods such as facilitation or mediation.

Fact-Finding:

A neutral expert resolves disputes arising over matters of fact, not interpretations of law. INSCOM has traditionally contracted with outside investigators to conduct its EEO fact-finding.

Facilitation:

Involves the use of techniques to improve the flow of information in a meeting between parties to a dispute with the use of a “**facilitator**”--used interchangeably with the term “mediator”, but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter. The facilitator generally works with all of the meeting’s participants at once and provides procedural directions as to how the group can efficiently move through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator may be a member of one of the parties to the dispute or may be an external consultant. Facilitators focus on procedural assistance and remain impartial to the topics or issues under discussion.

“In Confidence”:

Confidential information acquired during the ADR settlement process will be maintained “In Confidence.” This means that the expressed desire of a party that certain information disclosed to the mediator will be kept confidential and will not be disclosed to the other party without prior approval.

Interest-Based Negotiations:

The parties use negotiation strategies focusing on interests and common grounds rather than merit positions or adversarial posture. This technique reduces the importance of “how the dispute occurred” and focuses on “how to resolve” the dispute between the parties.

Interest-Based Problem Solving:

Technique that creates effective solutions while improving the relationship between the parties. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed upon standard to reach a solution. Trust in the process is a common theme in successful interest-based problem solving.

Mediation:

A trained neutral third party who facilitates voluntary negotiations between two or more parties to find a mutually acceptable settlement to a specific EEO complaint. This is INSCOM’s preferred resolution technique for the EEO process. The mediator has no authority to impose a decision on a party, and discussions remain “in confidence.”

Non-Party Participant:

A person or entity who is not a party to the dispute but who participates in the settlement proceeding, such as by providing information, analysis, advice, or views. Examples might include the individuals required to implement a particular solution to a dispute, such as; counselor, EEO Manager, and Personnelist.

Neutral or Neutral Third Party:

An individual skilled in dispute resolution who functions specifically to assist the parties in resolving a particular EEO controversy. The individual may be a Government employee or someone outside the Government. Neutrals under the EEO ADR process are very knowledgeable about EEO obligations but have no power to impose a solution on any party. The use of a neutral is always voluntary. A neutral does not have any official, financial, or personal conflict of interest with the issues in controversy or the parties.

Partnering:

Technique used to improve a variety of working relationships, primarily between the Federal Government and contractors, by seeking to prevent disputes before they occur. The method relies on an agreement in principle to share the risks involved in completing a project and to establish and promote a nurturing environment. This is done through the use of team-building activities to help define common goals, improve communication, and foster a problem-solving attitude among the group of individuals who must work together throughout a contract’s term.

WHAT A MEDIATOR CONSIDERS WHEN ENTERING A NEGOTIATION

It may be helpful to know what runs through a mediator's mind before and during a typical mediation. Below, we have adapted from a publication by the Administrative Conference of the United States an excellent summary of what the mediator, as a neutral third party, considers during a mediation:

1. The issues in dispute?
2. The wants and needs of each party?
3. The parties' proposals, positions, and real interests?
4. The parties' assumptions about the basis for the dispute?
5. The parties' alternatives to negotiation--who is bringing the action?
6. Expectations--what the parties expect of themselves and their counterparts?
7. What is "just," "fair," "equitable," and "true" according to the parties?
8. What do the representatives of the parties expect of the negotiating process and the specific mediator?
9. Trust--the degree of trust that exists or can be restored?
10. What are the "facts" as agreed to by the parties (not as determined by the mediator)?
11. Do the "politics" of the situation (inside and outside) help or hurt settlement?
12. What outside factors are affecting the negotiation?
13. The negotiation ground rules need to be closely followed?
14. The relevant law or standards to be applied to the facts?
15. Are there power relationships and what criteria is used by the parties to establish power?
16. Resources of the parties: legal, technical, political, financial--is there an imbalance of power?
17. The history of the relationship--is this a "one-shot" negotiation or part of a long-term relationship?
18. The objectives, strategy, and tactics of the parties--is the purpose to resolve a dispute? avoid a dispute? solve a problem? harmonize a relationship? improve a relationship?
19. The sophistication skills of the parties?
20. The amount of discretion available to the deciding official?
21. Ability to prevail in an evidentiary process as perceived by the parties?
22. Perception of parties' willingness to go to trial?

23. Personalities of the advocates and their styles of convincing and being convinced (e.g., idealists, realists, pragmatists, synthesizers, analysts)?
24. Whether participation in mediation is compulsory or voluntary?
25. Are there other possible processes for a negotiated settlement--hearing, court, arbitration, fact-finding, etc?
26. Effects of passage of time on the interests and expectations of the parties?

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Rather than “reinvent the wheel,” we gratefully acknowledge that the materials and procedures contained in this publication were “adapted” from the efforts of other Federal Government agencies. We modified ADR program materials derived from other government sources such as the Administrative Conference of the United States; Defense Logistics Agency (DLA), U.S. Army Corps of Engineers; Federal Deposit Insurance Corporation; Department of Energy, and the U.S. Department of Health and Human Services to implement a program tailored for the U.S. Army Intelligence and Security Command (INSCOM).

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